89-1628

NO. _____

SUPREME COURT OF THE UNITED STATES

WANDA LAVERNE SHEFFIELD

Petitioner

VS.

JOHNSON SEED COMPANY, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS
For The
FIFTH CIRCUIT

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Dallas, Texas 75219
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QUESTIONS PRESENTED

1. MAY A DISTRICT COURT IMPOSE SANCTIONS AGAINST COUNSEL FOR A PARTY WITHOUT A SPECIFIC FINDING OF BAD FAITH?

2. DOES THE DOCTRINE OF "THE LAW OF THE CASE" APPLY TO SANCTIONS IMPOSED AGAINST A PARTY AND THE PARTY'S COUNSEL?

3. DID THE DISTRICT COURT ABUSE ITS INHERENT POWERS BY AWARDING ATTORNEY FEES AGAINST COUNSEL FOR THE PETITIONER?

4. DID THE DISTRICT COURT ERRONEOUSLY APPLY 28 U.S.C. §1927?

5. IS A DISTRICT COURT REQUIRED TO MAKE SPECIFIC FINDINGS BEFORE AWARDING SANCTIONS AGAINST AN ATTORNEY WHEN THE CIRCUIT COURT HAS MANDATED SUCH FINDINGS. ALTERNATIVELY, DID THE DISTRICT COURT VIOLATE THE MANDATE OF THOMAS V. CAPITAL SECRETERIAL SERVICES, INC., 836 F.2d 866 (5TH CIR. 1988).

PARTIES

WANDA LAVERNE SHEFFIELD, Petitioner-Plaintiff

JOHNSON SEED COMPANY, INC., Respondent-Defendant

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NO. _____

Supreme Court of the United States

WANDA LAVERNE SHEFFIELD

Petitioner

VS.

JOHNSON SEED COMPANY, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI

To The

UNITED STATES COURT OF APPEALS

For The

FIFTH CIRCUIT

Wanda Laverne Sheffield petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The first judgment of the Court of Appeals was issued on June 4, 1987. (Appendix C) The second judgment on Appeal from the United States District Court for the Northern District of Texas Opinion, was issued December 12, 1989. (Appendix B)

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATEMENT

The background of this civil action is stated in detail in the opinion of the Fifth Circuit. *Wanda Laverne Sheffield v. Johnson Seed Company, Inc., et al. No. 86-1919* Summary Calendar, June 4, 1987, (Appendix C)

Petitioner filed her original complaint on March 13, 1985, *pro se.*

Petitioner's counsel did not enter the case until November 25, 1985 when he filed his Notice of Representation. Prior to counsel entering, the Defendants in the District Court had filed an Answer, a Motion to Dismiss, and a Brief In Support Of The Motion To Dismiss. Appellant, acting *pro se,* had filed a Motion For Temporary Restraining Order, and a Motion For

Summary Judgment with attached affidavits.

At the time that Plaintiff's counsel filed his Notice Of Representation, the only Orders in the case were an Order Of Reference to the Magistrate and a Pretrial Scheduling Order.

At the time that counsel for the Petitioner filed the Notice of Representation, Notice of Deposition *duces tecum*, were filed on three non-party witnesses and two party witnesses. Counsel for Petitioner also moved to extend the time for Discovery and the Discovery deadline was extended on several occasions while the depositions were attempted to be taken.

On February 4, 1986 Respondents filed their first Motion For Imposition Of Cost And Attorney's Fees, with an attendant Brief.

On April 3, 1986 Respondents filed a Motion For Imposition Of Sanctions Including Dismissal, Attorney's Fees, Expenses and Costs, with a supporting Brief.

Petitioner responded to these motions for sanctions and Magistrate Tolle, acting under authority of an Order of Reference, RECOMMENDED on April 28, 1986 that the Court "...require that Plaintiff to pay the sum of $410.00 as reasonable fees and costs incurred by Defendant because of her failure to

attend and give her deposition on March 5, 1986. In all other respects, I recommend that the Motion for Sanctions be denied."

On May 12, 1986, Respondents filed Defendants' Objections To Magistrate's Recommendation. In this document Respondents objected to the Magistrate's recommendation on the following grounds:

1. A general objection to the Magistrate's recommendations on the grounds that the minor monetary sanctions suggested would be insufficient to deter future misconduct, insufficient to punish for the misconduct to date and would provide inadequate relief to the Defendant.

2. A specific objection to the Magistrate's refusal to consider Respondent's contention that the Petitioner's case was frivolous and was being prosecuted in bad faith.

3. A specific objection that the Magistrate did not recommend an award of attorney's fees and costs incurred as related to Respondent's prior motion for imposition of fees and costs, filed February 4, 1986.

4. A specific objection that the Magistrate did not

recommend an award of attorney's fees and costs incurred by the Respondents in relation to the first two deposition non-appearances by the Petitioner.

5. A specific objection and request that "...the Court should at least award attorney's fees and costs incurred by those non-appearances..." of Petitioner. Further, a request that the Court should dismiss Petitioner's case with prejudice "...and award to the Defendants the full reasonable amount of their attorney's fees and costs."

6. A specific objection to the Magistrate's refusal to impose sanctions regarding "...the misrepresentation made to the Court by Plaintiff's counsel, Mr. Hernandez." Further, Respondent requested that "The falsity and materiality of the misrepresentation are conclusively shown by the record of this cause, and should not be allowed to pass without penalty."

7. A specific objection to the Magistrate's refusal to order sanctions against Petitioner and Respondent's counsel for knowingly using a process server who had an interest in the litigation.

8. A specific objection that the Magistrate did not recommend an award of attorney's fees and costs incurred on February 26, 1986, when Petitioner's counsel failed to appear for two depositions of non-party witnesses, which Petitioner's counsel had scheduled to occur in his office.

9. A specific objection that the Magistrate did not recommend an award of attorney's fees or expenses regarding Petitioner's counsel's refusal to cooperate in framing a reasonable plan for continuing Discovery.

10. A specific objection that the Magistrate did not recommend that the monetary sanctions he recommended against Petitioner be imposed against Petitioner's counsel, in addition to Petitioner, jointly and severally. Specifically, Respondents argued that the imposition of sanctions against Petitioner alone would not have sufficient deterrent effect and could leave the Respondents without relief since they had a $15,833.30 judgment entered against Petitioner on January 11, 1985, in a separate state court action. Further, Respondents argued that Petitioner's counsel should be held personally

accountable "...not only for his acts of misconduct as set forth above, but also for his overall role in encouraging and continuing the prosecution of this malicious lawsuit.

11. Respondents, in their prayer, requested that Court dismiss Petitioner's action with prejudice and enter an order enforceable under pain of contempt against Petitioner and her counsel, jointly and severally, directing Petitioner and her counsel to pay to Respondents, by a date certain, an amount equal to Respondents' attorney's fees, expenses and costs reasonably expended in the case.

12. On August 18, 1986, the District Court entered an Order wherein it Ordered:

> 1. The Appellees, Johnson Seed Company, Inc., Lew Meibergen, Ed Polk, the Law Firm of Ramsey & Ramsey, and Robert K. Ramsey, Esq. shall recover from "...Plaintiff Wanda Laverne Sheffield that sum of $410.00 as a sanction for her failure to appear at her deposition on

March 5, 1986 as ordered by Magistrate of this Court, John B. Tolle," and

2. Denied Appellant's Motion for Summary Judgment, and,

3. Granted the Motion of the Appellee to dismiss "and the complaint of the Plaintiff is dismissed with prejudice;" and, denied Appellant's request to reopen Discovery.

This Order was the Final Judgment in this litigation.

On August 27, 1986, within ten days of this dispositive Order of the Court, Petitioner filed a Motion for a New Trial. Between the dates of August 27, 1986 and December 2, 1986, the date that the Court entered an Order denying Petitioner's Motion for New Trial, there was activity in the litigation, including a September 25, 1986 Order enlarging time for the Respondents to file an application for attorney's fees and costs until October 17, 1986.

On December 19, 1986, Petitioner filed a proper Notice of Appeal appealing from the Order entered on December 2, 1986.

Respondents did not appeal from the final Order entered by the District Court.

During the appeal of this case the first time, Respondents argued as Proposition Two that an award of Respondents' attorney's fees, expenses and double costs should be assessed against Appellant and Appellant's counsel. In the argument, the Respondents additionally argued that the claims by Petitioner were frivolous and that Respondents specifically requested that Petitioner's counsel be held liable along with the Petitioner under the provisions of Fed.R.Civ.P. 11 and 28 U.S.C. §1927. Additionally, Respondents argued, that an award "...running only against Sheffield most likely would leave the Appellees with a hollow award" and urged the Fifth Circuit Court of Appeals to hold Petitioner's counsel liable for his role in maintaining a frivolous lawsuit. Petitioner concluded by requesting that the Fifth Circuit Court of Appeals enter a judgment that Petitioner's claims were frivolous and maintained in bad faith and that Petitioner's attorney be held individually liable. Respondents also prayed that "...this Court affirm the decision rendered by the Court below."

On June 4, 1987, the Fifth Circuit Court of Appeals in a

Per Curiam Opinion affirmed the actions of the District Court. (Appendix C)

While the case was on appeal, Respondents continued to file with the District Court Motions for Enlargement of Time to Apply for Attorney's Fees, Expenses and Costs, and filed Supplemental Motions to the same effect and on January 26, 1987, while the case was on appeal, the District Court entered an Order enlarging by 30 days the time for Respondents to file their appropriate motion. On February 5, 1987, Respondents filed a Motion For Protective Order to prevent Petitioners from deposing counsel for the Respondents to determine the amount of attorney's fees, expenses and costs and Respondents in a hearing before Magistrate Tolle on February 11, 1987, "...represented at the hearing that there is a real possibility that Defendants will not seek attorney's fees in this case..." and Magistrate Tolle, relying on this representation, granted the Protective Order as related to the deposition of the attorneys until a motion for attorney's fees was presented to the Court.

On March 11, 1987, Respondents filed a Motion For Award Of Attorney's Fees, Expenses And Costs and, after Petitioner filed a Motion To Strike said Motion for Leave to File

which was granted by the Court on May 15, 1987.

On July 31, 1987 Respondents filed a Supplemental Brief In Support Of Defendant's Motion for Award For Attorney's Fees, Expenses and Costs.

Fourteen months later, on September 29, 1988, the District Court entered an Order granting the Defendant's Motion for Attorney's Fees (Appendix A).

On October 14, 1988, Petitioner filed a Motion And Brief To Reconsider the Order granting Defendant's Motion For Attorney's Fees which was denied by the Court on Nobember 7, 1988.

REASONS FOR GRANTING THE WRIT

CONFLICTING CIRCUIT COURT OPINIONS

There are conflicting circuit court opinions on the issues raised in this case. See: Zambano v. City of Austin, 885 F.2d 1473 (9th Cir. 1989) as compared to Thomas v. Capital Secretarial Services, Inc., 836 F.2d 866 (5th Cir. 1988).

BAR NEEDS GUIDANCE

The bar needs to know when an attorney is going to be held responsible for the opposing party and counsel's fees as sanctions under 28 U.S.C. §1927 and Rule 11 and the "inherent

powers of the Court."

DO DISTRICT COURTS NEED TO MAKE EXPLICIT FINDINGS

The bar needs to know if District Courts must make explicit findings of bad faith actions or other actions before the attorney is liable for monetary sanctions.

THE COURT WAS CLEARLY ERRONEOUS AND COMMITTED ERROR BY NOT PROPERLY APPLYING THE DOCTRINE OF THE LAW OF THE CASE.

In the Court Order of September 29, 1988 it is made to appear that the Respondents filed a Motion For Award of Attorney's Fees, Expenses And Costs on May 15, 1987 and that the Petitioner failed to respond to their motion and that Respondents filed a Supplemental Brief on July 31, 1988. In actuality, the Respondents have continuously filed for attorney's fees, expenses and costs.

Up until the granting of the Order granting Defendants' Motion for Attorney Fees by the District Court on September 29, 1988, the only recovery that the Respondents had made was for the failure of the Petitioner to appear at a deposition, and the District Court imposed a $410.00 monetary sanction against the

Petitioner. Actually, the District Court affirmed the recommendation of Magistrate Tolle. In accordance with Rule 4(d)(3), of Miscellaneous Order No. 6 which states that the "...ruling of a magistrate in a matter which he is empowered to hear and determine is a ruling of the Court and is final unless reversed, vacated or modified by the District Judge to whom the action is assigned." This is exactly what happened in this case. Magistrate Tolle entered his Recommendation on April 28, 1986 recommending that the District Court require Petitioner to pay the sum $410.00 as reasonable fees and costs incurred by Respondents because of her failure to attend and give her deposition on March 5, 1986. Magistrate Tolle, having considered the argument of counsel for the Respondent and the Respondent's position that the litigation was frivolous and in bad faith, and that Petitioner's counsel should be sanctioned under Rule 11, recommended "... that the Motion for Sanctions be denied." The District Court in its Order of August 18, 1986, recognized that it had before it a Recommendation of the Magistrate and followed the Recommendation of the Magistrate. In addition, the District Court denied Petitioner's Motion For Summary Judgment, Motion to Reopen Discovery and

granted Respondent's Motion to Dismiss with prejudice.

At the time that the District Court entered its Order of August 18, 1986, it had before it Defendants' Objection to Magistrate's Recommendation that had been filed on May 12, 1986 which generally and specifically objected to the actions of Magistrate Tolle. The District Court, in affirming the Recommendation of Magistrate Tolle denied the relief requested by Respondents both before the District Court.

Petitioner and her counsel have continuously opposed attorney's fees, expenses and costs incurred by the Respondent and did not respond to the Supplemental Brief filed by the Respondent on July 31, 1987, which was filed 57 days after the *Per Curiam* Opinion entered by this Court on June 4, 1987 because it is Petitioner's position that the Opinion that the Fifth Circuit Court of Appeals entered on June 4, 1987 disposed of the attorney's fees, costs and expense issue as related to this case.

It is Petitioner's position that Section VIII of the June 4, 1987 Opinion disposes of the issue of this case being frivolous or that the lawsuit was maintained in bad faith or that the Respondents are entitled to attorney's fees, expenses and costs related to this case.

The doctrine of the "Law of the Case" dictates that the first Opinion in this case cannot be collaterally attacked. *Pettway v. American Iron Pipe Co.*, 576 F.2d 1557, 1196-97 n.42 (5th Cir. 1978) cert. denied, 439 U.S. 115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979).

Under the "Law of the Case" a prior decision of the Court of Appeals, in the absence of exceptional circumstances, the prior decision will be followed without re-examination, both on the remand to the District Court and on subsequent appeals to the Fifth Circuit Court of Appeals. *Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092 (5th Cir. 1983); *Doe v. Marshall*, 694 F.2d 1038 (5th Cir. 1983); *Morrow v. Dillard*, 580 F.2d 1284 (5th Cir. 1978); *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981); *Terrell v. Household Goods Carriers Bureau*, 494 F.2d 16 (5th Cir. 1974) *cert. denied*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974).

The requirement under the "Law of the Case" doctrine that a Court follow earlier decisions in the same proceeding "comprehends things decided by necessary implication as well as those decided explicitly." *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978), citing *Terrell v. Household Good*

Carriers' Bureau, supra.

It is clear that the Respondents thoroughly briefed and presented to the Fifth Circuit Court of Appeals the issue of the frivolous nature of the lawsuit and the bad faith nature of the lawsuit.

It is clear that the Fifth Circuit Court of Appeals rejected Respondent's argument on the frivolous appeal issue and that the Court rejected Respondent's arguments on the bad faith and harassment issues, as well, as Respondent's arguments that Respondent's counsel be held personally liable for attorney's fees, expenses and costs.

In its Order granting Defendants' Motion for Attorney's Fees entered September 29, 1988, the District Court stated that it believed "that the Petitioner brought this suit in bad faith," and on that basis, awarded attorney's fees, expenses and costs against the Petitioner. It is Petitioner's position that the doctrine of the "Law of the Case" applied to the frivolous, bad faith, harassment and personal liability of Petitioner's counsel because the *per curiam* Opinion clearly decided that the initial appeal was not frivolous and by necessary implication that the action was not brought in bad faith or for purposes of harassment

and that Petitioner's counsel should not be held personally liable.

No appeal was taken by the Respondents of the August 18, 1986 dispositive Order entered by the Court that affirmed Magistrate Tolle's recommendation and, by necessary implication, overruled Respondent's objections to Magistrate Tolle's recommendations. More than ten days elapsed after the entry of the dispositive Order without the Respondent having filed either a Motion to Alter or Amend under Fed.R.Civ.P. 59(e), or any of the other post-judgment motions that suspend the period for filing the Notice of Appeal and give the District Court an opportunity to correct its judgment, *see Fed.R.App.P. 4(a)(4); d.Knibb, Federal Court of Appeals Manual, §6.1 at 67 (1981).* On August 27, 1986, within 10 days of the entering of the dispositive Order, Petitioner filed a Motion for New Trial and Supporting Brief which was denied on December 2, 1986, and on December 19, 1986 timely filed Notice of Appeal and the Fifth Circuit Court of Appeals entered its *per curiam* Opinion on June 4, 1987, affirming the decision of the District Court.

Under the doctrine of the "law of the Case" the District Court is precluded from holding that Petitioner brought this suit

in bad faith, for purposes of harassment, as a frivolous lawsuit or that Petitioner's attorney should be held personally liable for attorney's fees, expenses and costs. In fact, the District Court had already considered all of Respondent's arguments on these issues and had rejected them when it entered the Order of August 18, 1986, dismissing Petitioner's action.

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO AWARD ATTORNEY'S FEES, EXPENSES AND COSTS

The procedural history outlined in the Statement of the Case demonstrates that the District Court did not have jurisdiction to enter the Order Awarding Attorney's Fees on September 29, 1988.

After the Court entered its dispositive Order of August 18, 1986, the Respondent had ten days to file either a Motion to Alter or Amend or any of the other post-judgment motions that suspend the period for filing a Notice of Appeal to give the District an opportunity to alter its Dispositive Order. The Respondent did not file any Motion to Alter or Amend the Order within ten days and when Petitioner filed its timely Notice of Appeal with thirty days of the entry of the Order denying the

Plaintiff's Motion for New Trial that action caused the immediate transfer of jurisdiction from the District Court to the Fifth Circuit Court of Appeals with respect to any "matters involved in the appeal." 9 Moore's Federal Practice para. 203.11, at 3-44 (2d ed. 1980); see *Offshore Logistics Services Inc., v. Mutual Marine Office, Inc.*, 639 F.2d 1168, 1170, (5th Cir. 1981). Because the dispositive Order of the District Court of August 18, 1986 was a "matter involved in the Appeal", the District Court could not enter any Orders as related to attorney's fees, expenses and costs, nor enter any Orders as related to the frivolous nature of the lawsuit, the bad faith of the lawsuit, the harassment aspects of the lawsuit or the personal liability of Petitioner's counsel for Respondent's attorney's fees, expenses and costs.

The dispositive Order entered by the District Court disposed of all claims of all the parties and was clearly applicable.

The Fifth Circuit Court of Appeals, in its *per curiam* Opinion affirmed the dispositive Order of August 18, 1986, and did not remand the case to the District Court so the District Court never reacquired jurisdiction to enter any Orders as relate to any

matters in this case after the Notice of Appeal was properly and timely filed by the Petitioner. *Gryar v. Odeco Drilling, Inc.* 674 F.2d 373 (5th Cir. 1982). Accordingly, all of the District Court's Orders entered after December 19, 1986 must be vacated. The dispositive Order of the District Court was final and was affirmed on appeal.

THE DISTRICT COURT WRONGFULLY APPLIED 28 U.S.C. §1927.

There is no evidence in the record to indicate that counsel for the Petitioner multiplied the proceedings in this case in an unreasonable and vexatious manner as is required by 28 U.S.C. §1927.

In the first instance, the pleadings were not multiplied.

In the second instance, there were no unreasonable pleadings, and many of the pleadings filed by Petitioner's counsel were in response to Respondent's Motions for Protective Order and Motions for Sanctions and Motions to Enlarge Time Periods.

In the third instance, there were no vexatious pleadings filed.

In the fourth instance, the activities of the Petitioner and

her counsel in this are clearly differentiated from the activities from Petitioner and counsel in *Batson v. Niel Splece Associates, Inc.*, 805 F.2d 546 (5th Cir. 1986), a case relied upon by the District Court. In *Batson*, this Court initially remanded the case to the District Court so that the District Court could consider the use of its inherent powers in determining to dismiss Petitioner's case and enter attorney's fees and costs. Since the Appellate Court had remanded the case to the District Court, the District Court entered extensive written Findings of Fact and Conclusions of Law which were affirmed on the second appeal. In the instant case, the District Court did not in its dispositive Order of August 18, 1986 enter an Order under 28 U.S.C. §1927, and its attempt to use its inherent powers after a final determination on the case on appeal is not a proper application of 28 U.S.C. §1927.

THE DISTRICT COURT ABUSED ITS INHERENT POWERS BY AWARDING ATTORNEY'S FEES AGAINST THE APPELLANT AND APPELLANT'S COUNSEL.

THE COURT WAS CLEARLY ERRONEOUS IN APPLYING RULE 11 AND VIOLATED THE MANDATE OF

THOMAS V. CAPITAL SECRETARIAL SERVICES, INC.,

836 F.2d 866 (5TH CIR. 1988).

The District Court concluded that Petitioner's counsel continued the case to harass the Respondents and on the basis of that, awarded attorney's fees, expenses and costs against Petitioner and Petitioner's attorney individually.

The District Court also charged Petitioner's counsel with failing to conduct a reasonable inquiry into the facts and the law that would apply to the instant case before entering his appearance on Petitioner's behalf.

An analysis of the activities of Petitioner's counsel from the date of November 25, 1985, until the conclusion of the case, indicates the following pleadings were filed by Petitioner's counsel. The pleadings are as follows:

(1) November 25, 1985 Notice of Representation

(2) November 25, 1985 Notice of Deposition Duces

(3) November 25, 1985 Notice of Deposition

(4) December 6, 1985 Notice of Depositions

(5) January 6, 1986 Plaintiff's Motion to Extend Time for Discovery

(6) January 21, 1986 Motion and Brief to

Compel Appearance

(7) January 21, 1986 Plaintiff's Second Motion to Extend Time

(8) January 21, 1986 Notice of Deposition

(9) April 25, 1986 Response to Defendants' Motion

(10) April 30, 1986 Response to Defendants' Joint Status Report.

(11) May 15, 1986 Plaintiff's Motion to Extend Discovery

(12) August 27, 1986 Motion for New Trial

(13) October 8, 1986 Plaintiff's Motion for Leave

(14) October 15, 1986 Plaintiff's Response

(15) December 19, 1986 Notice of Appeal.

It is quite clear that none of these pleadings violate Rule 11 and that none of these pleadings were a continued harassment of the Respondents.

The issuing of Notices of Depositions do not constitute harassment. In this particular case, Respondent's counsel was advising the witnesses that Petitioner was attempting to depose

not to appear. The transcript of the hearing held on October 22, 1986, on Respondent's Motion for Sanctions before the Honorable John B. Tolle clearly indicates that Respondent's counsel advised the Court that he was advising the witnesses, Sandra Paulson and Oliver Paulson that they were under no duty to appear although they had been served legally with an appropriate subpoena *duces tecum* and had been tendered a thirty dollar witness fee. On page five of the transcript, Mr. Ragucci related to the Court the following:

> "Again, I pointed out to them [the Paulsons] that they were under no duty to appear. And even told them what the amounts of those mileage fees should be."

It was Mr. Ragucci's opinion that Mr. and Mrs. Paulson did not need to appear for the deposition that they were subpoened to appear for because they were not tendered mileage fees, although they were tendered the thirty dollar witness fees, by cashier's check. In fact, the practice in the Northern District of Texas is that if mileage is to be claimed, the witness is to submit his mileage fee claim after he has accumulated the mileage, and not before, and that as long as the witness fee has been tendered

and the subpoena has been served, the witness must appear. In effect, much of the problem that the Petitioner had in never successfully taking the deposition of the Paulsons was attributable to the advice given by Respondent's counsel.

Further analysis of the pleadings filed by Petitioner's counsel indicates that the Notice of Deposition Duces Tecum on the representatives of the Respondents, Johnson Seed Company, Inc., was met with a Motion for Protective Order and a Motion to Quash because they did not want to appear for their deposition in Dallas, or at all. Certainly, the issuing of a Notice of Deposition Duces Tecum is not violative of Rule 11 and is not a continued harassment, since no deposition had been taken in the case.

The District Court in its Order granting attorney's fees says that it is apparent that "this action" was filed to delay the Respondents from taking lawful possession of the land. This is completely incorrect. An analysis of Plaintiff's Original Complaint which was filed pro se, and which was not amended by Plaintiff's counsel, does not request possession of and in no way interferes with the Respondents from taking possession of the land. In fact, at the time that this lawsuit was pending, the

Respondent sold the property to Sandra and Oliver Paulson for $70,000.00. Since Petitioner filed her Original Complaint on March 13, 1985, and Petitioner's counsel did not appear in the case until November 25, 1985, it can hardly be maintained that either "this action" or Petitioner's counsel's activities delayed the Respondents from taking possession of the land.

The District Court further stated that "this action" was designed to harass Respondent. There is simply no evidence of harassment in this lawsuit by Petitioner or by Petitioner's counsel.

The District Court further stated that "this action" was filed to increase Respondent's cost of litigation. There is no evidence of this in the record and an analysis of the Respondent's attorney's time will show that many of the costs incurred were self-imposed. In this case, counsel for the Respondent charged numerous hours for the work that he did on other cases relating to these parties, that was not related to this action. In fact, in excess of forty (40) hours are for work done on other cases, not done on this case.

The District Court concluded that the service of the Subpoena Duces Tecum by Mr. Treuter on the Paulsons was

legal. The service of the subpoenas on the Paulsons in no way affected the Respondents because the Paulsons were non-parties to the lawsuit. The service of the subpoena on a non-party to a lawsuit cannot be abusive to the Respondent because the Respondents were not affected in any way. Respondent's attorney was affected in this case because he was advising the Paulsons that they did not need to show up for their deposition.

The Respondents have imposed upon the Petitioner numerous hours for work that it did for its own self-serving purposes.

For example, the Respondents filed three (3) Motions For Enlargement of Time to File Attorney's Fees, and then, when they did not meet the deadline to file the Application for Attorney's Fees, filed additional pleadings to be allowed to file the Application for Attorney's Fees.

For example, Petitioner filed a Notice to Take the Deposition of the attorneys to determine the reasonableness of the fee and Petitioner was to take Defendants' attorney's deposition on October 15, 1986. Magistrate Tolle quashed the Notice Duces Tecum becaus Respondent's attorney indicated that they were not sure that they would seek attorney's fees. However, the

very next day, October 16, 1986, Respondent's filed Defendant's Second Motion for Enlargement of Time to Apply for Attorney's Fees. In effect, Respondents misled Magistrate Tolle so that they could quash the subpoena as premature, which Magistrate Tolle did (see Magistrate Tolle Order, October 15, 1986) and then the next day filed the request for additional time with the District Court. For example, on February 11, 1987, Magistrate Tolle granted a Protective Order preventing Petitioner from taking the deposition of Respondents' counsel. At the hearing, counsel for Respondents represented that "...there is real possibility that Defendant's will not seek attorney's fees in this case..." and based on that representation, Magistrate Tolle ordered that Discovery with reference to attorney's fees should not be made until a Motion for Attorney's Fees was presented to the District Court.

For example, on May 5, 1987, Respondents filed a Motion to Compel Production of Transcripts and to Impose Sanctions. This was denied.

Petitioner, and her counsel, are mindful of the concerns of the Judges of the 5th Circuit and of the Northern District of Texas, and understand that a District Court does not have to

provide specific findings and conclusions in all Rule 11 cases. However, in this litigation, the basis and jurisdiction for a Rule 11 decision is not readily discernible on the Record, and, consequently, Petitioner requested that the District Court make an adequate explanation of the Rule 11 violation by Petitioner's counsel.

Petitioner and her counsel requested that the District Court make an adequate explanation of the decision it made in determining that it "believed" that the case was brought in bad faith.

Petitioner and her counsel requested that the Court make an adequate explanation for the decision the Court made to utilize the provision of 28 U.S.C. §1927, particularly in view of the opinion of this Court issued on June 4, 1987.

Petitioner and her counsel requested that the Court make an adequate explanation of the decision it made in utilizing the inherent powers of the Court to control litigants, particularly in view of the opinion of this Court issued on June 4, 1987.

It is Petitioner's position that although it would impose upon District Courts an onerous and often times consuming burden of making specific findings and conclusions in this type

of case generally, the Record in this case is not sufficiently clear, and the Court has not sufficiently delineated the application the Rule 11, 28 U.S.C. §1927, and the Court's inherent power to control litigants so that this Court can determine from the Record the reasoning of the District Court.

The District Court has not sufficiently delineated the "bad faith" of the Petitioner and the "continued harassment" of the Respondents by Petitioner's counsel.

Petitioner and her counsel did not make this request to impose an onerous burden on the District Court, but made it so that this Court could have an adequate explanation as required by *Thomas v. Capital Secretarial Services, Inc.*, 836 F.2d 866, 883 (5th Cir. 1988).

CONCLUSION

Petitioner moves the Court to grant the Writ of Certiorari, vacate the Judgment of the Court of Appeals, and remand the case to the District Court to either make explicit findings or deny the Motion for Attorney Fees.

Respectfully submitted,

FRANK P. HERNANDEZ
TBC #09516000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded to Stephen Ragucci, Brice & Mankoff, 300 Crescent Court, Suite 700, Dallas, Texas 75201, via United States Mail, postage pre-paid, on this the _____ day of April, 1990.

_____
FRANK P. HERNANDEZ

AFFIDAVIT OF COUNSEL AS TO MAILING OF WRIT OF CERTIORARI

I, Frank P. Hernandez, counsel for Wanda Laverne Sheffield, Petitioner, swear that the foregoing petition was deposited in the United States Mail, with the proper postage, on March _____, 1990.

_____
FRANK P. HERNANDEZ

STATE OF TEXAS §
COUNTY OF DALLAS §

Sworn to and subscribed before me, a notary public by the said Frank P. Hernandez, on this _____ day of March, 1990 to which witness my hand and seal of office.

_____
NOTARY PUBLIC IN
AND FOR THE STATE
OF TEXAS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WANDA LAVERNE SHEFFIELD,
Plaintiff,

VS. CA3-85-0516-T

JOHNSON SEED COMPANY, INC.,
et al

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEY FEES

On May 15, 1987, Defendants filed their motion for award of attorney fees, expenses, and costs. Plaintiff has failed to respond to their motion and Defendants filed a supplemental brief in support of their motion on July 31, 1988.

This action arises out of a suit filed by Plaintiff against Defendants alleging RICO violatios involving a state court decision. The underlying state court action was brought by Defendant Johnson Seed Company against Plain-

tiff Sheffield and several other members of the Universal Life Church of Garland. Johnson Seed had sold a tract of land secured by a deed of trust to the church and when the property went into default Sheffield and several church members refused to vacate the land. Thereafter, Johnson Seed filed trespass to try title actions in state court against Sheffield and the church members. Sheffield counterclaimed against Johnson Seed alleging superior title to the land by virtue of a "land patent."

On January 10, 1985, summary judgment was entered against Sheffield on her counterclaim and in favor of Johnson Seed on its claim. Sheffield appealed the judgment which was eventually affirmed by the Texas Supreme Court. On March 13, 1985, two months after the summary judgment in the state action, Sheffield filed this complaint in federal court. Sheffield filed the complaint pro se. The basis for her complaint was that Defendants violated the RICO Act in using the courts to disposes her of her land. Sheffield also filed another complaint in federal court seeking a preliminary injunction on March 27, 1985. The injunction was denied, and the case was subsequently dismissed by the Hon. A. Joe

Fish on May 28, 1985. Sheffield retained counsel, Frank P. Hernandez, who entered the case on Plaintiff's behalf on November 25, 1985.

On August 18, 1985, this Court granted Defendant's motion to dismiss based upon the principles of res judicata relating to the state court action. On June 4, 1987, this decision was upheld by the Fifth Circuit, Dk. #86-1919. The Fifth Circuit stated that to recover under a RICO claim Plaintiff would have to prove the validity of the land patent. The validity of the land patent was precisely the issue of Plaintiff's counterclaim in state court.

Defendant Johnson Seed has filed an application for attorney fees based on the conduct of Plaintiff and Frank Hernandez, and seeks imposition of joint and several liability against them. Because this Court believes that Plaintiff Sheffield brought this suit in bad faith and that Hernandez continued the case to harass Defendants, Defendant's application for attorney fees will be granted pursuant to Fed.R.Civ.Proc. Rule 11; 28 U.S.C.§ 1927; and the Court's inherent equitable power to control the conduct of litigants in its court.

SANCTIONS

This Court is mindful of the Fifth Circuit's recent pronouncement of the proper Rule 11 standars in Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc) as well as the Fifth Circuit's refusal to grant attorney fees for the appeal of the present case. Nevertheless, this Court believes that sanctions are warranted against Plaintiff and her counsel because of the particular facts of this case. Sanctions may be appropriate where a decision not to award attorneys' fees on appeal does not touch upon the frivolous nature of the plaintiff's claim. See, Erie Conduit Corporation v. Metropolitan Asphalt Paving Association, 106 F.R.D. 451, 458 n. 13 (E.D.N.Y. 1985).

Pursuant to the new interpretation of Rule 11, this Court may only consider the conduct of the litigants at the instant of their signing of the pleading. The Fifth Circuit specifically eliminated any requirement that counsel has a continuing obligation to review and reevaluate his position as a case develops.

However, this Court finds that Plaintiff did not conduct a reasonable inquiry into the law that would apply to her

case. It is clear to this Court that the viability of Plaintiff's RICO allegation was dependent upon the same issue as was decided against her in the state court. Hernandez also failed to conduct a reasonable inquiry into the facts and the law that would apply before entering his appearance on Plaintiff's behalf.

Plaintiff litigated her counterclaim and lost. It is apparent to this Court that this action was filed to delay Johnson Seed from taking lawful possession of the land, to harass Johnson Seed, and to increase their costs of litigation.

In Thomas id. at 875, while the Court appears to have reduced the vitality of Rule 11, it did recognize that protection from abusive litigation tactics in respects other than the signing of papers is provided by other rules governing attorney conduct. Under 28 U.S.C. §1927, a court may assess costs, attorneys' fees and expenses personally against an attorney who multiplies the proceedings in a case unreasonably and vexatiously. A district court may also award attorneys' fees to a prevailing party when the losing party has acted in bad faith in actions that led to the lawsuit or in the conduct of the litigation based on its own inherent powers.

See, Hall v. Cole, 412 U.S. 1, 93 S. Ct. 1943, 36 L. Ed.2d 702 (1973); Batson v. Neal Spelce Associates, Inc., 805 F.2d 546 (5th Cir. 1986).

The Court finds that both Plaintiff and her counsel acted in bad faith throughout the litigation in this Court and should be sanctioned by being held liable for Defendants' costs, attorney fees and expenses under the Court's inherent power to control the litigants before it.

The actions of the litigants, which draw the Court to the conclusions it reaches today, are a clear abuse of the litigation system. Plaintiff filed her suit in federal court reasonably knowing that the state action would preclude her recovery. Hernandez should reasonably have known prior to his entering the suit that Plaintiff was precluded from recovery. The suit was brought and continued in order to harass, delay and increase Defendants' litigation expense. During discovery, Plaintiff refused to have her deposition taken three times, one of which had been ordered by the magistrate. Eventually she was sanctioned by this Court to pay $410 to Defendants which she has refused to do.

Hernandez also had Mr. and Mrs. Paulsen, the couple

who were trying to purchase the land from Johnson Seed, served with subpoenas for depositios by kenneth Trueter. A copy of a quit claim deed shows that Sheffield had tried to convey an interest in this property to Treuter. While Treuter is not technically a party to the action, allowing him to act as the process server to the couple living on the land was abusive, in bad faith, and done to harass Defendants.

Furthermore, on February 17, 1987 this Court ordered Plaintiff to file a bond in the amount of $2,500 to cover the costs of appeal. Despite the denial of her motion for reconsideration on April 24, 1987, Plaintiff has failed to post any security.

The Court, having considered Defendants' motion for attorney fees, the circumstance of this case, and the conduct of the parties, is of the opinion that attorney fees are warranted as a deterrent to the abusive behavior of Plaintiff and her counsel and to protect the dignity of this Court. Therefore, Defendants' motion for award of attorney fees is granted against Plaintiff and her counsel jointly and severally.

AWARD OF ATTORNEY FEES

Findings of Fact

In accordance with Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), the Court makes the following findings of fact based upon the affidavits submitted by Defendants attorney:

Factor 1

Time and Labor Required

The Court finds that Defendant's attorney charged the following amount for 312 hours expended in this case from January 1986 until February 11, 1987, which does not include time expended for this motion or the appeal:

$31,200.00	Attorney fees
$ 2,525.96	Expenses
$33,725.96	Total

Defendants' attorney has adequately itemized his expenses and hours in the time records and billing statements he has submitted.

The Court has reviewed the time records and billing

statements and finds no duplication of effort, no unnecessary billing, and no pursuit of frivolous claims.

Defendants' attorney charged a flat rate of $100.00 per hour. He did not include time for other attorneys, paralegals, law clerks, or other clerical personnel.

The Court finds that expenses in the amount of $2,525.96 for photocopying, long distance phone calls, postage, parking, and transportation were incurred in pursuit of the litigation. The Court finds these expenses were ordinary and necessary to the pursuit of the litigation.

Factor 2

Novelty and Difficulty of the Questions

The substantive issues in this case were not novel or difficult.

Factor 3

Skill Requisite to Perform the Legal Services Properly

This action does not appear to have required specialized knowledge of any type or more than average skills.

Factor 4

Preclusion of Other Employment

Defendants' attorney does not state whether this

action precluded him from other employment.

Factor 5

Customary Fee

The fees charged were, in the Court's experience, customary for this type of litigation in the Northern District of Texas.

Factor 6

Whether Fee is Fixed or Contingent

Defendants' attorney charged fees based upon an hourly rate, as detailed above.

Factor 7

Time Limitations Imposed by the Client or Circumstances

Defendants' attorney does not state that there were any time limitations imposed upon him.

Factor 8

Amount Involved and Results Obtained

Plaintiff initially sought $100,000.00 in lost profit trebled, plus punitive damages. As Defendants were the prevailing party, Plaintiff took nothing against Defendants.

Factor 9

Experience, Reputation, and Ability of Attorney

Defendants' attorney did not address this factor but Defendants' attorney and his firm enjoy good reputations in the Northern District of Texas.

Factor 10

Undesirability of the Case

Defendants' attorney did not address this factor.

Factor 11

Professional Relationship with the Client

Defendants' attorney did not address this factor.

Factor 12

Awards in Similar Cases

Because this award is based upon the misconduct of Plaintiff and her counsel, consideration of awards in other similar cases would not be helpful.

The Court therefore finds, after considering Factor 1, that the nature and extent of the services provided required the expenditure of 312 hours of time by Defendants' attorney.

The Court finds, in considering Factor 5, that the customary value of the services and the result obtained, according to prevailing rates in the Northern District of Texas

in similar litigation, justifies the charge for legal services at the hourly rate of $150.00.

The Court further finds that a reasonable attorney's fee, based upon the services provided and the customary rates, prior to ant adjustment by consideration of other Johnson factors, is $46,800.00.

The Court finds that the amount of attorney fees which Defendants request, $31,200.00, is below the amount which this Court finds reasonable, and therefore it is also reasonable.

The Court further finds that Factors 2-4, and 6-12, do not justify any additioal adjustment of the attorney fees.

Conclusions of Law

In setting a reasonable attorney's fee, the Court should consider the twelve Johnson factors in the framework outlined in Copper Liquor, Inc. v. Adolph Coors, 684 F.2d 1087, 1092 (5th Cir. 1982); that is, (1) ascertain the nature and extent of the services supplied by the attorney; (2) value the services according to the customary fee and quality of legal work; and (3) adjust the compensation on the basis of the other Johnson factors which may be of significance in the

particular case. Nisby v. Commissioenrs Court of Jefferson County, 798 F.2d 134, 136 (5th Cir. 1986).

The product of Copper Liquor steps (1) and (2) is the "lodestar." The Court then considers the applicable remaining factors to determine if the lodestar should be adjusted. Nisby, 798 F.2d at 137.

Therefore, the Court, having found that Defendants are entitled to recover their reasonable and necessary attorney fees, that the sum of $31,200.00 is a reasonable attorney fee for the legal services rendered to Defendants, that Defendants should also recover the ordinary and necessary expenses incurred by their attorney in additio to costs, that the ordinary and necessary expenses total $2,525.96, concludes that Defendants should be awarded attorney fees and expenses jointly and severally from Plaintiff and her counsel in the amount of $33,725.96.

Signed this 28 day of September, 1988.

_____

ROBERT B. MALONEY

UNITED STATES

DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1982

WANDA LAVERNE SHEFFIELD,

Plaintiff-Appellant,

versus

JOHNSON SEED COMPANY, INC., ET AL.

Defendants-Appellees.

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Appeal from the United States District Court for the
Northern District of Texas

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CA-3-85-0516-T
(December 12, 1989)

Before GOLDBERG, GARWOOD and DAVIS, Circuit Judges

PER CURIAM: AFFIRMED.

See Local Rule 47.6.

APPENDIX C
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1919
Summary Calendar

WANDA LAVERNE SHEFFIELD,

Plaintiff-Appellant,

versus

JOHNSON SEED COMPANY, INC., et al.,
Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Texas
(CA3-85-0516-T)

(June 4, 1987)

Before GEE, REAVLEY and JOLLY, Circuit Judges.

PER CURIAM:

Wanda Sheffield ("Sheffield") appeals from the district court's dismissal of her lawsuit against the appellees. Because we find that the district court properly applied the principles of res judicata to

Sheffield's claims, we affirm its judgment.

I

In November 1979, Johnson Seed Company, Inc. (Johnson) sold a tract of land in Kaufman County, Texas, to the Universal Life Church of Garland, secured by a deed of trust.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

After the church's initial default, Johnson foreclosed in May 1983, and entered into a contract to sell the land to other buyers. Closing on the contract was delayed because of the refusal of Wanda Sheffield and other church members to vacate the land which was being used by them as a group residence.

Johnson filed trespass to try title actions in state court against Sheffield, Lester Reeves and all others claiming ownership of the land through the church.

Sheffield counterclaimed, alleging superior title to the land by virtue of a "land patent" which she executed to herself and recorded in the land records of Kaufman County, Texas. She alleged that Johnson lacked a "Certificate of Authority" from the State of Texas, and asserted that the foreclosure violated her civil rights. The essential element in both the counterlcaim and the federal complaint that Sheffield later filed is her contention that she owns the land by virtue of her "land patent."

On January 10, 1985, summary judgment was entered in state court in favor of Johnson. Sheffield's appeals to the state court of civil appeals and to the Texas Supreme Court were unsuccessful. She then sought a new appeal of the same order (sub nom. Reeves v. Johnson Seed Co.), on grounds that the other appeals were mere "nullities" because, in that it left her counterclaim unresolved, the summary

judgment was not final. On August 18, 1986, a hearing was held in the same state trial court, after which the court entered its order holding that Sheffield's counterclaim failed to state a cause of action and stating that "the matters pleaded in said Counterclaim have heretofore been adjudicated." Sheffield then sought and on November 12, 1986, received from the state court another order. The order was signed by all counsel and again confirmed that the counterclaim had been previously denied.

II

Sheffield filed her complaint in federal court on March 13, 1985, alleging that the appellees violated the Racketeer Influenced Corrupt Organizations Act (RICO) in using the courts to dispossess her of "her" land, and then sold the land to other buyers while they "knew or should have known that [she] had her land patent to the property and that the land patent is the true legal and paramount title to the property."

In their answer, the appellees denied

Sheffield's factual allegatios and asserted that the complaint failed to state a cause of action, that the claim had already been determined by the state court and was on appeal in the state system, and that the complaint violated Fed.R.Civ.P. 11. The answer requested sanctions, including dismissal.

The appellees filed further motions to dismiss and, during ensuing discovery disputes, filed five motions for protective orders. Sheffield twice failed to appear for deposition as noticed by the appellees, and further failed to appear for deposition as set by court order. Pursuant to a second order compelling attendance, she finally appeared for deposition.

On April 3, 1986, the appellees filed a Motion for Imposition of Sanctions Including Dismissal, and in their supporting brief argued the need for sanctions to deter discovery abuse, misrepresentations to the court and Rule 11 violatios. After a hearing on the motion, the magistrate recommended that Sheffield pay sanctions of $410. The appeallees asserted in their subsequent "Objections to Magistrate's Rec-

ommendation" that the sanctions were insufficient and requested de novo review by the district court.

On August 18, 1986, the district court dismissed the action with prejudice, holding that certain procedural action taken by Sheffield was frivolous, and ordering her to pay the $410 sanctions. The court held that Sheffield had "already had her day in Court." On December 2, 1986, the court entered its order denying Sheffield's motion for a new trial, and on December 19, 1986, Sheffield filed her notice of appeal.

III

On appeal, Sheffield argues that the district court improperly dismissed her action against the appellees because (1) the state court judgment on which the district court relied was not final at the time the district court dismissed Sheffield's action; (2) res judicata is inapplicable in this case because Sheffield's claim in federal court is based on civil RICO, whereas the state court action involved a dispute over title ownership of land; (3) the appellees

failed to plead res judicata as an affirmative defense and hence could not rely upon it as a basis for dismissing Sheffield's actions; (4) the state court judgment cannot be relied upon as it is void, since the state court judge failed to recuse himself as required by law. We reject all of these arguments.

IV

Sheffield argues that the district court improperly applied res judicata to Sheffield's suit because the district court dismissed her suit on August 18, 1986, and the state court judgment on which the district court relied did not become final until November 12, 1986.

This problem, however, was cured by subsequent proceedings in the district court. In her motion for a new trial, Sheffield pointed out that the state court judgment was not final at the time the district court dismissed Sheffield's claim. In its December 2, 1986, order denying her motion, the district court noted this contention, but held that any problem had been cured by the passage of time be-

cause the state court judgment had subsequently become final. Thus, even though the district court may have been incorrect in originally dismissing Sheffield's claim, its December 2 order properly held that Sheffield's claim was barred by because the state court judgment had become final by that time. We see no sound reason to allow Sheffield to relitigate issues adjudicated in state court simply because the state court judgment was not final at the time the district court originally dismissed her suit. A valid and final state court judgment has been issued and the principles of judicial economy upon which res judicata law is based would be ill serviced by allowing Sheffield a second bite at the apple now.

V

Sheffield contends that the district court improperly ruled that her claim against the appellees was barred by res judicata because the state court dispute involved a dispute over land ownership while Sheffield's claims in federal court are grounded on the civil RICO statute, U.S.C.§1964(c). Sheffield

assumes that the district court's dismissal of her claim was based on claim preclusion only and that the district court musttherefore be in error since the claims advanced in federal and state court were different. But we do not believe that the district court's judgment is subject to such a narrow reading. We believe that the district court's judgment can and should be interpreted as being based on issue preclusion, since res judicata bars both the raising of previously litigated claims and the relitigation of issues that were or could have been raised in prior litigation. Wright, Federal Courts (4th ed. 1983) 680-82. Although it is true that Sheffield's RICO cause of action is different from the cause of action she pursued in state court, central to her RICO claim is her contention that she maintains an ownership in the disputed land involved in this case. But this issue has already been decided against her in state court. Since principles of res judicata bar her from relitigating the issue of her ownership of the land in question, her RICO claims, which depend upon a

resolution of this issue in her favor, must fail.

VI

Sheffield argues that the appellees may not rely on the doctrine of res judicata because they failed to raise res judicata as an affirmative defense in the pleadings. We reject this argument.

Sheffield cites Texas law in support of her position, but this ignores the fact that the Federal Rules of Civil Procedure and not Texas procedural law govern pleading matters in federal court. Generally, a party cannot base a motion to dismiss on res judicata, and must plead that doctrine as an affirmative defense. Fed.R.Civ.P. 8 (c), 12. This court has held, however, that where the facts pertaining to the res judicata motion are not controverted, a district court may properly dismiss an action on res judicata grounds. Moch v. East Baton Rouge Parish School Board, 548 F.2d 594, 596 n.3 (5th Cir. 1977); Larter & Sons, Inc. v. Dinkler Hotels Co., 199 F.2d 854, 855 (5th Cir. 1952). Since the facts were established so as to allow the district court to rule on the res judi-

cata issue as a matter of law, we conclude that the district court's dismissal of Sheffield's suit was procedurally proper.

VII

Finally, Sheffield argues that the state court judgment was not valid (and hence cannot be considered for res judicata purposes), because the judge who signed the January 10, 1985, summary judgment was a relative of the wife of one of the appelees, and hence should have recused himself as mandated by Texas law. Sheffield did not raise this argument before the district court. Ordinarly an issue not presented to or passed upon by the district court will not be considered by this court on appeal. Clark v. Aetna Casualty & Surety Co., 778 F.2d 242, 249 (5th Cir. 1985). This rule will be departed from only in exceptional cases when a pure question of law is presented which if not ruled upon will lead to a miscarriage of justice. Id. Sheffield has not shown that this is such an exceptional case, and, accordingly, we will not consider on appeal her challenge to

the validity of the state court judgment.

VIII

The appellees have requested that this court award them attorney's fes, expenses and double costs pursuant to Fed.R.App.P. 38, on the grounds that Sheffield's appeal is frivolous and thereby taken and maintained in bad faith. Although Sheffield's legal position on appeal is very weak, we do not regard her appeal, in the posture presented to us, to be sufficiently lacking in merit to warrant the imposition of sanctions under Fed.R.App.P. 38.

IX

For the reasons discussed earlier, the judgment of the district court is

AFFIRMED.